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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

SUPREME COURT  
Case No.: R-09-0009

PETITION TO ADD NEW RULE  
804(b)(5) ARIZONA RULES OF  
EVIDENCE

COMMENT TO PETITION TO ADD  
NEW RULE 804(b)(5) ARIZONA  
RULES OF EVIDENCE

The Arizona Prosecuting Attorneys' Advisory Council [APAAC] supports the petition to amend Rule 804(b) to add a new hearsay exception when the defendant has deliberately acted to make the declarant witness unavailable for trial. However, the petition suggests that the new exception adopt the exact language found in the current Federal Evidence Rule. APAAC would modify the proposed rule's suggested language to add language to cover situations in which the defendant encourages another person to engage in wrongdoing that is intended to make the declarant witness unavailable for trial and in fact makes the witness unavailable for trial.

In *Giles v. California*, \_\_ U.S. \_\_, 128 S.Ct. 2678 (2008), the United States Supreme Court held that, unless the defendant had deliberately acted with both the intent and the result that the declarant witness would be unavailable to testify at trial, there was no “forfeiture by wrongdoing” exemption to the Confrontation Clause rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004).

Note that *Giles* does not destroy the time-honored equitable principle that a person shall not profit from his own wrong. “The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. ” *Reynolds v. United States*, 98 U.S. 145,

1 158 (1878). In a case that preceded both *Crawford* and *Giles*, the Arizona Court of Appeals  
2 stated the rule thus: “If a defendant silences a witness by violence or murder, the defendant  
3 cannot then assert his Confrontation Clause rights in order to prevent the admission of prior  
4 testimony from that witness. ” *State v. Valencia*, 186 Ariz. 493, 498, 924 P.2d 497, 502 (App.  
5 1996). While *Crawford* and *Giles* radically changed the law on the Confrontation Clause, it is  
6 important to remember that *Giles* did not put an end to the fundamental principle of “forfeiture  
7 by wrongdoing” – it merely imposed a requirement that that, for the principle to apply, the  
8 defendant must *intend* to make the witness unavailable.

9 Arizona law has recognized the “forfeiture by wrongdoing” analysis. After *Crawford* but  
10 before *Giles*, the Arizona Court of Appeals foresaw some of the *Giles* problems in *State v. King*,  
11 212 Ariz. 372, 380, ¶ 37, n. 5, 132 P.3d 311, 319 (App. 2006), stating:

12 We recognize that application of the expanded right of confrontation announced  
13 in *Crawford* may produce unjust results if the victim or any witness is unavailable  
14 due to intimidation or criminal conduct by the alleged perpetrator. We note that  
15 courts recognize a forfeiture-by-wrongdoing analysis by which a trial court may  
16 find that a defendant has forfeited his right of confrontation if the State establishes  
17 that the defendant procured or induced the unavailability of the witness. See  
18 *Crawford*, 541 U.S. at 62, 124 S.Ct. 1354; *Reynolds v. United States*, 98 U.S. 145,  
19 25 L.Ed. 244 (1878); *State v. Valencia*, 186 Ariz. 493, 924 P.2d 497 (App. 1996).

20 Further, in the context of decedents’ estates, the so-called “slayer’s statute,” A.R.S. § 14-  
21 2803(A) states, that “A person who feloniously and intentionally kills the decedent forfeits all  
22 benefits under this chapter with respect to the decedent’s estate. ” The equitable principle that a  
23 person shall not be allowed to profit from his own wrong has endured for so long because it is  
24 fundamentally fair and sound. As Justice Breyer noted in his dissent in *Giles*:

25 Contrast (a) the defendant who assaults his wife and subsequently threatens her  
26 with harm if she testifies, with (b) the defendant who assaults his wife and  
subsequently murders her in a fit of rage. Under the majority’s interpretation, the  
former (whose threats make clear that his purpose was to prevent his wife from  
testifying) cannot benefit from his wrong, but the latter (who has committed what  
is undoubtedly the greater wrong) can. This is anomalous, particularly in this  
context where an equitable rule applies.

*Giles v. California*, \_\_ U.S. \_\_\_, 128 S.Ct. 2678, 2699 (2008) [Breyer, J., dissenting].

1 While APAAC supports the petition to amend Rule 804, APAAC believes additional  
2 language should be added. The petition suggests the following language, with the part in  
3 question highlighted:

4 (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the  
5 declarant is unavailable as a witness:

6 (5) *Forfeiture by wrongdoing*. A statement offered against a party  
7 that has **engaged or acquiesced in** wrongdoing that was intended  
to, and did, procure the unavailability of the declarant as a witness.

8 After *Giles*, Indiana amended Rule 804(b) of its Rules of Evidence, effective January 1, 2009, to  
9 conform with the requirements of *Giles*. The Indiana Rule now reads as follows, with the  
10 language that differs from the Federal Rule highlighted:

11 (b) **Hearsay Exceptions**. The following are not excluded by the hearsay rule if  
12 the declarant is unavailable as a witness.

13 (5) *Forfeiture by wrongdoing*. A statement offered against a party  
14 that has **engaged in or encouraged** wrongdoing that was intended  
15 to, and did, procure the unavailability of the declarant as a witness  
**for the purpose of preventing the declarant from attending or**  
**testifying.**

16 APAAC suggests adding the “encouraged” language from the Indiana Rule to the  
17 language of the Federal Rule, resulting in the following proposed new Rule 804(b)(5):

18 (b) **Hearsay exceptions**. The following are not excluded by the hearsay rule if  
19 the declarant is unavailable as a witness:

20 (5) *Forfeiture by wrongdoing*. A statement offered against a party  
21 that has **engaged in, encouraged, or acquiesced in** wrongdoing  
22 that was intended to, and did, procure the unavailability of the  
declarant as a witness.

23 This language is broad enough to encompass all forms of “wrongdoing” that “was intended to,  
24 and did, procure the unavailability of the declarant as a witness,” both when the defendant  
25 personally engaged in that wrongdoing and when the defendant “encouraged” or “acquiesced in”  
26 such wrongdoing by others. APAAC believes that this language satisfies the requirements of  
*Giles* and *Crawford*, while preserving the equitable principle of “forfeiture by wrongdoing.”

1 Therefore, APAAC asks this Court to grant the petition to amend Rule 804(b) with the proposed  
2 additional language.

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4 Respectfully submitted this 14 of May, 2009.

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8 Executive Director  
9 Arizona Prosecuting Attorneys' Advisory Council

10 Copies of the foregoing have  
11 been electronically filed  
12 this 14 day of May, 2009 with:

13 Arizona Supreme Court

14 Copies of the foregoing have been mailed  
15 This 14 day of May, 2009 to:

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